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Adam Dauksas

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DONINGER'S WEDGE: HAS AVERY DONINGER BRIDGED THE WAY FOR INTERNET VERSIONS OF MATTHEW FRASER?

ADAM DAUKSAS*

I. INTRODUCTION

A. *Students Finding Voice Online*

Using the Internet to express thoughts and connect with peers outside of the classroom via social networking websites, such as Formspring, Facebook, and MySpace, has become a way of life for our nation's increasingly technology-savvy middle and high-school-aged students.¹ Fortunately, these students are not using such websites to only post lists of their favorite friends or incriminating photographs of themselves.² A recent study done by

* J.D. 2010, *cum laude*, The John Marshall Law School. Presently, Adam Dauksas is an associate with Scariano, Himes and Petrarca, Chtd. in Chicago. The author would like to thank his mother, Linda, and father, Jay, for teaching him lessons that no law school, lawyer, or judge ever could.

1. NATIONAL SCHOOL BOARDS ASSOCIATION, CREATING & CONNECTING: RESEARCH AND GUIDELINES ON ONLINE SOCIAL – AND EDUCATIONAL – NETWORKING I (2007), *available at* <http://www.nsba.org/site/docs/41400/41340.pdf> [hereinafter SCHOOL BOARDS] (finding 96% of students, nine to seventeen years of age, with online access reported using social networking technologies). The Internet now rivals television for student's attention away from the classroom: students are spending almost as much time on the Internet (nine hours per week) as watching television (ten hours per week). *Id.*; *see also* Dave Nagel, *Reseach: Students Actually Use the Internet for Education*, THE JOURNAL, Aug. 2007, <http://www.thejournal.com/articles/21116> (summarizing the data contained in the National School Boards Association's study); AMANDA LENHART, WRITING, TECHNOLOGY AND TEENS 3 (Apr. 24, 2008), http://www.pewinternet.org/PPF/r/247/report_display.asp (follow "View PDF of Report" hyperlink) (providing that 85% of teens ages twelve to seventeen reported using electronic communications to communicate with their peers). *See generally* MADELEINE SCHACHTER, LAW OF INTERNET SPEECH 5-10 (Carolina Academic Press 2001) (discussing the nature of the Internet and how it has evolved into a mass forum of individuals' ideas and expressions).

2. *See* Erica Perez, *Getting Booked by Facebook*, MILWAUKEE JOURNAL SENTINEL, Oct. 2, 2007, <http://www.jsonline.com/story/index.aspx?id=670380> (explaining how social networking websites such as Facebook and MySpace are being used by police to investigate student crimes and violations); *cf.* Colleen Vest, *Social Networking Sites: Friend or Foe?*, DAILYILLINI.COM, Sept. 15, 2008, <http://media.www.dailyillini.com/media/storage/paper736/news/200>

the National School Boards Association found nearly 60% of students who use online social networking websites discuss relevant educational topics, and more than 50% talk specifically about school assignments.³ However, public school administrators have begun to pay close attention to *how* their students are expressing themselves online and are even doling out punishment for controversial speech created on the Internet, completely away from the classroom.⁴

B. No Love for School Administrators Results in No Love from the Second Circuit

Perhaps nobody understands the far-reaching authority of today's school administrators better than Avery Doninger.⁵ During the Spring of 2007, Avery and her fellow Student Council members at Lewis Mills High School ("LMHS"), a public school located in Burlington, Connecticut, were charged with the task of planning an event called "Jamfest," an annual and popular battle-of-the-bands concert.⁶ Upset over the administration's potential

8/09/15/FallCareerGuide2008/Social.Networking.Sites.Friend.Or.Foe-3430019.shtml (explaining the need for students to be more cautious on social networking sites because of the potential impact the information they post may have on their future careers).

3. SCHOOL BOARDS, *supra* note 1, at 2. To put into perspective how frequently students are using the Internet to communicate with their peers, only 32% of students use the Internet to download music. *Id.* at 3.

4. See Susan H. Kosse, *Student Designed Home Web Pages: Does Title IX or the First Amendment Apply?*, 43 ARIZ. L. REV. 905, 915 (2001) ("[T]here is an abundance of reported instances of schools trying to discipline students for web pages created at home."); see, e.g., Kyle W. Brenton, Note, *BONGHiTS4JESUS.COM? Scrutinizing Public School Authority over Student Cyberspeech Through the Lens of Personal Jurisdiction*, 92 MINN. L. REV. 1206, 1206-07 (2008) (noting school administrators, fearful of "another Columbine" are attempting to regulate student online expression believed by them to be improper). Brenton's article proposes courts use a version of the personal jurisdiction test to determine whether school administrators have constitutional authority over a student's online expression. *Id.* at 1209, 1230-34.

5. See Stephanie Dahle, *Online Speech Pits Students vs. Teachers*, ABC NEWS, Mar. 13, 2008, <http://abcnews.go.com/TheLaw/Story?id=4431954&page=1> (explaining Avery Doninger's scenario and how "[s]peech that once might have been punished without a second thought is now becoming the subject of First Amendment battles when moved online."); Susan Haigh, *Burlington Teen Sues School Officials over Free Speech Issue*, BOSTON.COM, July 16, 2007, http://www.boston.com/news/education/k_12/articles/2007/07/16/burlington_teen_sues_school_officials_over_free_speech_issue/ (summarizing the facts underlying Doninger's complaint).

6. *Doninger v. Niehoff*, 527 F.3d 41, 44 (2d Cir. 2008). Prior to Doninger's blog posting, she and three fellow student council members met at the school's computer lab and, using a student's father's email account, drafted an email message that was then sent to a large number of citizens within the community. *Id.* The email drafted by the four students urged, in pertinent

postponement of the event, Doninger took to her publicly accessible web log ("blog"), which was hosted by LiveJournal.com, an entity completely unaffiliated with LMHS, to express her feelings.⁷ From the confines of her home, Doninger urged others to contact the "douchebags" in the school's central office to "piss [them] off more."⁸

After school administrators learned of the language contained in Doninger's online blog post, she was disqualified from running for Senior Class Secretary at LMHS.⁹ Lauren Doninger, Avery's mother, sued, alleging her daughter's rights under the First

part, for its recipients to contact school administrators and voice their support for Jamfest to be held as scheduled. *Id.* Both the school's superintendent and principal received an "influx" of telephone calls and emails after the email written by the students was sent. *Id.* Besides a verbal warning, none of the students, including Doninger, were subsequently disciplined for their actions in writing this email from the school's computer lab. *Id.* at 45.

7. *Id.* See generally LiveJournal.com, <http://www.livejournal.com/site/about.bml> (last visited Mar. 27, 2010) (explaining that LiveJournal.com is a social networking website that allows millions of users to post public or private blogs and connect with other users throughout the world).

8. *Doninger*, 527 F.3d at 45. Avery's blog post read as follows:

[J]amfest is cancelled due to douchebags in central office. here is an email that we sent to a ton of people and asked them to forward to everyone in their address book to help get support for jamfest. basically, because we sent it out, Paula Schwartz is getting a TON of phone calls and emails and such. we have so much support and we really appreciate it. however, she got pissed off and decided to just cancel the whole thing all together. andddd so basically we aren't going to have it at all, but in the slightest chance we do it is going to be after the talent show on may 18th. andd..here is the letter we sent out to parents.

Id.

The blog post then *reproduced* the email the Student Council members had sent earlier. The post continued: "And here is a letter my mom sent to Paula [Schwartz] and cc'd Karissa [Niehoff] to get an idea of what to write if you want to write something or call her to piss her off more. im down.-" Avery then reproduced on her blog an email that her mother had sent to the school's superintendent [Schwartz]. *Id.*

9. *Id.* at 46. School authorities were not aware of Doninger's blog post until a son of the superintendent Paula Schwartz discovered it while using an Internet search engine. *Id.* All of Avery's other classmates who participated in writing the email from the school's computer lab were allowed to run for class office positions. *Id.* at 53. Although disqualified from putting her name on the official ballot, Avery still received a plurality of students' votes as a write-in candidate. *Id.* Regardless, she was forced by LMHS' principal, Karissa Niehoff, to forego taking the position. *Id.*

It is clear from the facts set forth in the opinion, the only difference between the three other students and Avery was that Avery had written a blog post using vulgar language about the events and circumstances surrounding the holding of Jamfest. See *supra* text accompanying notes 6 & 8 (distinguishing Doninger's actions from her fellow student council members); see also *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 209 (D. Conn. 2007) (citing the principal's own testimony that the email written by the students was not the basis for any disciplinary action).

Amendment to the United States Constitution had been violated.¹⁰ In concluding that Doninger's punishment would likely generate no First Amendment violation, the Second Circuit Court of Appeals upheld the district court's denial of Doninger's request for a preliminary injunction seeking to void the secretary election results.¹¹

In so holding, the court based its decision on a 1969 United States Supreme Court case that dealt solely with on-campus student expression.¹² According to *Tinker v. Des Moines Independent Community School District*,¹³ school administrators may prohibit on-campus student expression that causes, or is likely to cause, a material and substantial disruption to the work and discipline of a school.¹⁴ Because it was the Second Circuit's opinion that Doninger's online post created a foreseeable risk of substantial disruption to the work and discipline of LMHS, no First Amendment violation was substantially likely to be present.¹⁵

C. What Is the Point?

Part I of this Comment will explore the background and evolution of the limited First Amendment rights currently enjoyed

10. *Doninger*, 527 F.3d at 47. In addition to Doninger's First Amendment claim under the United States Constitution, she also alleged violations of an analogous clause of the Connecticut Constitution, Doninger's due process and equal protection rights under the Fourteenth Amendment, and asserted a cause of action for intentional infliction of emotional distress under state law. *Id.* For the purposes of this Comment, only the First Amendment claim under the United States Constitution is at issue.

11. *Id.* (citing *Sunward Elecs., Inc. v. McDonald*, 362 F.3d 17, 24 (2d Cir. 2004) ("A party seeking a preliminary injunction ordinarily must show: (1) a likelihood of irreparable harm in the absence of the injunction; and (2) . . . a likelihood of success on the merits."). The district court concluded Doninger had not demonstrated a sufficient likelihood of success on the merits and the appellate court reviewed the denial for an abuse of discretion. *Id.*

12. *Id.* at 50 (discussing which Supreme Court precedent pertaining to student First Amendment rights should be applicable to the facts surrounding Doninger's claim).

13. 393 U.S. 503 (1969).

14. *Id.* at 509.

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained.

Id.

15. *Doninger*, 527 F.3d at 51-52 (explaining what the court believed to be a risk of substantial disruption at LMHS posed by Doninger's blog post).

by our nation's public school students. Part II will analyze the *Doninger* decision, using relevant federal and state cases that have similarly attempted to apply *Tinker* to student, online expression issues as a backdrop, to help demonstrate this standard's readily apparent flaws.¹⁶ This section will also set forth what the court's ruling in *Doninger* may mean for public school students in the future. Part III will propose the Supreme Court adopt a 'true-threat' form of First Amendment analysis¹⁷ to determine whether public schools have the constitutional authority to punish students for expression created online, away from a school's campus.

II. BACKGROUND

A. *The First Amendment and Freedom of Speech*

The First Amendment to the Constitution of the United States of America reads, "Congress shall make no law . . . abridging the freedom of speech."¹⁸ Despite the First Amendment's absolute language, the right of freedom of speech remains qualified in several respects.¹⁹ An individual's speech is subject to

16. See *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1181 (E.D. Mo. 1998) (deciding the issue under *Tinker* of whether a school district, as an actor of the state, may constitutionally punish a student for forms of expression that were created online). See generally *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779 (E.D. Mich. 2002); *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002); *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587 (W.D. Pa. 2007); *Wisniewski v. Bd. of Ed. of Weedsport Central Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007). *Contra* *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (discussing *Tinker* and other First Amendment precedents applicable to student expression, but ultimately deciding the issue without mentioning if there was any risk of material and substantial disruption to school functions caused by a student's online expression).

17. See *Watts v. U.S.*, 394 U.S. 705, 707 (1969) ("What is a threat must be distinguished from what is constitutionally protected speech."). Robert Watts, then eighteen years old, had hinted at assassinating then-President Lyndon B. Johnson during a discussion with others regarding police brutality. *Id.* at 706. The Supreme Court reversed Watts' conviction, concluding the "political hyperbole" he had engaged in did not rise to the level of a "true threat." *Id.* at 708.

18. U.S. CONST. amend. I. See SCHACHTER, *supra* note 1, at 3-5 (providing a brief synopsis of the fundamental purposes underlying the First Amendment). For purposes of this Comment, only the clause of the First Amendment pertaining to freedom of speech is at issue.

19. See *Cohen v. California*, 403 U.S. 15, 19 (1971) ("[T]he First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses."); see also *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (holding no First Amendment protection for words that "tend to incite an immediate breach of the peace"); *Miller v. California*, 413 U.S. 15, 23 (1973) (holding obscene forms of expression carry no First Amendment protections); *New York v. Ferber*, 458 U.S. 747, 764 (1982) (holding child pornography is unprotected by the First

reasonable time, place, and manner restrictions so long as the restrictions are narrowly tailored to serve an important government interest.²⁰ In the past, courts have applied this same form of strict judicial scrutiny to speech on the Internet as well.²¹

1. *Public School Students Do Indeed Possess First Amendment Rights*

In 1943, the Supreme Court recognized that the First Amendment protects a student's right to freedom of speech within public schools in *West Virginia State Board of Education v. Barnette*.²² In stating that public boards of education are "creatures" of the state bound by the Fourteenth Amendment, the Court ruled that students could not be compelled to salute our nation's flag by threat of punishment.²³ The Court expressly sought to protect a student's intellectual individualism in not only inconsequential matters, but also those "that touch the heart of the existing order."²⁴ *Barnette* was certainly a jumping-off point for students' First Amendment rights, but not until the liberal Warren Court tackled the issue in *Tinker* did students begin to experience their greatest on-campus freedoms.²⁵

Amendment).

20. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968) ("[W]e think it clear that a government regulation is sufficiently justified . . . if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) ("Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided . . . that they are narrowly tailored to serve a significant governmental interest . . .").

21. See *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (striking down the Communications Decency Act as facially overbroad in violation of the Constitution and holding online speech is to receive the same judicial scrutiny that is applied to other forms of constitutionally protected expression).

22. 319 U.S. 624 (1943).

23. *Id.* at 642 (recognizing that students, who were Jehovah's Witnesses, had the right to choose whether to stand and salute the flag with the rest of their classmates at a public school).

24. *Id.* at 637, 641-42. Justice Robert Jackson, for the majority, went on to state, "That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source . . ." *Id.* at 637.

25. See Tony Freyer, *Hugo Black and the Warren Court in Retrospect*, in *THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* 99 (Mark Tushnet ed., University Press of Virginia 1993) (discussing how J. Hugo Black believed *Tinker* had in effect, "pushed free expression beyond proper limits, undercutting traditional sources of order"). See generally MICHAEL R. BELKNAP, *THE SUPREME COURT UNDER EARL WARREN, 1953-1969* 292 (Alex Moore ed., University of South Carolina Press 2005) (discussing several of the

2. *Student First Amendment Rights Apex: Tinker v. Des Moines Independent Community School District*

In 1965, three students, including John and Mary Beth Tinker, were suspended from attending classes at a Des Moines, Iowa public school for wearing black armbands that expressed their nonviolent opposition to the Vietnam War.²⁶ The students' fathers sued, alleging their children's First Amendment rights had been violated by the school's actions.²⁷ In its analysis, the Court began by noting First Amendment rights of students must be "applied in light of the special characteristics of the school environment"²⁸ However, the Court went on to famously state, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gates."²⁹

In holding the school district had violated the students' First Amendment rights, the Court rejected the notion that an unsubstantiated fear of disturbance was enough to censor on-campus student expression.³⁰ Only if it could be shown that a student's speech caused, or was likely to cause, a material and substantial disruption to the work and discipline of the school, could a school district's punishment be constitutionally permissible.³¹

3. *Tinker Who?*

The standard set forth in *Tinker*, by which a school may

justices' personal opinions pertaining to the issues surrounding the case).

26. *Tinker*, 393 U.S. at 504. The Court found it especially noteworthy that school authorities did not prohibit other forms of political expression by students. Rather, the school hastily decided to single out only those students who opposed the Vietnam War for punishment. *Id.* at 510. *See generally Cohen*, 403 U.S. at 23 (holding content-based regulation will trigger heightened judicial scrutiny that almost no state action will survive).

27. *Tinker*, 393 U.S. at 504. The decision for the students to wear the black armbands was fully supported by their parents. This was evidenced by the fact that the parents of Christopher Eckhardt, who was also suspended by the Des Moines Independent Community School District, hosted a group meeting, which included children and adults. *Id.*

28. *Id.* at 506.

29. *Id.*; *see also* Nadine Strossen, *Freedom of Speech in the Warren Court*, in *THE WARREN COURT* 70 (Bernard Schwartz ed., Oxford University Press 1996) (suggesting that by the Court's ruling in *Tinker*, "the Warren Court was unwilling to perpetuate long-lived assumptions that certain speech could be restricted because of the identity or status of the speakers").

30. *Tinker*, 393 U.S. at 508.

31. *Tinker*, 393 U.S. at 509, 513. *See* LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 322 (The Belknap Press of Harvard University Press 2000) (implying J. Abraham Fortas, who authored the majority's opinion in *Tinker*, dissented in *Watts* because of his close ties to President Johnson).

punish its students in accordance with the Constitution, has not remained without significant limitations on its scope. In 1986, the Supreme Court in *Bethel School District No. 403 v. Fraser*³² made clear a student's right to use offensive language while on campus was not the same as an adult's away from it.³³ Because schools are charged with the duty of inculcating "fundamental values necessary to the maintenance of a democratic political system," the Court found that punishing a student for "lewd and offensive" speech that is made on school grounds presents no First Amendment violation.³⁴

Two years later, following the Burger Court's lead in *Fraser*, a conservative Rehnquist Court again took a swipe at *Tinker*'s standard in *Hazelwood School District v. Kuhlmeier*.³⁵ In affirming the constitutionality of a high school principal's decision to delete two pages of articles pertaining to controversial subjects from the school's student newspaper, the Court chose not to apply *Tinker*.³⁶ It did, however, recognize that "educators' [have] authority over school-sponsored publication . . . that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."³⁷

32. 478 U.S. 675 (1986).

33. *Id.* at 682 ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."). *But see* *Lopez v. Tulare Joint Union High Sch. Dist.*, 34 Cal. Rptr. 2d 762, 774 (Cal. Ct. App. 5th Dist. 1995) (holding state statutes may create greater student free speech rights than those provided by the United States Constitution).

34. *Fraser*, 478 U.S. at 683. For an example of what the Court deemed to be 'lewd and offensive' Justice William Brennan reproduced an excerpt of Matthew Fraser's speech in the concurring opinion:

I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.

Id. at 687 (Brennan, J., concurring).

35. 484 U.S. 260, 272-73 (1988) (articulating why *Tinker* was inapplicable to a school lending its resources to circulate a student's speech); *see* TINSLEY E. YARBROUGH, *THE REHNQUIST COURT AND THE CONSTITUTION* 208-09 (Oxford University Press 2000) (discussing the Court's shift towards extending great deference to government in cases involving the scope of freedom of expression); *see also* Erwin W. Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker*, 48 *DRAKE L. REV.* 527, 541 (2000) (claiming that after *Fraser* and *Kuhlmeier*, "the *Tinker* majority's approach to student speech is no longer followed.").

36. *Kuhlmeier*, 484 U.S. at 270-71.

37. *Id.* at 271. The Court went on to state that "educators do not offend the

Moreover, in 2007, the Roberts Court in *Morse v. Frederick*³⁸ explicitly stated that “the rule of *Tinker* is not the only basis for restricting student speech.”³⁹ In ducking the broader issue of whether a school may constitutionally regulate a student’s off-campus expression,⁴⁰ the Court found no First Amendment violation present in a student’s punishment for displaying a banner that read “BONG HiTS 4 JESUS” at a school-sanctioned Olympic torch rally in Juneau, Alaska.⁴¹ The Court declared that “the special characteristics of the school environment . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use.”⁴² In his concurring opinion, Justice Clarence Thomas wanted to simply overrule *Tinker* and strip public school students of whatever First Amendment protections they may have left.⁴³

B. Where Are We Now?

The Supreme Court has ruled that a school may constitutionally punish a student for his or her speech that: (1) takes place on campus and will likely cause a material and substantial disruption to school functions;⁴⁴ (2) is lewd and offensive while given on school property;⁴⁵ (3) might reasonably be

First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” *Id.* at 273.

38. 551 U.S. 393 (2007).

39. *Id.* at 405 (citing both *Fraser* and *Kuhlmeier* for the proposition that *Tinker*’s rationale in determining whether a school has violated a student’s First Amendment rights is not absolute).

40. See *Kuhlmeier*, 484 U.S. at 272 (stating that schools already had the authority to censor speech advocating illegal drug or alcohol abuse).

41. *Morse*, 551 U.S. at 400. The Court rejected Joseph Frederick’s claim that he was not on school property and thus not subject to the school’s authority, because although he had stood across the street from his high school, his banner was directed towards other students attending the event during normal school hours. *Id.* See generally Bill Mears, ‘Bong Hits 4 Jesus’ Case Limits Student Rights, CNN, June 26, 2007, <http://www.cnn.com/2007/LAW/06/25/free.speech/index.html> (providing a summary of the Court’s ruling and insight from Joseph Frederick as to why he displayed the banner).

42. *Morse*, 551 U.S. at 408. Deborah Morse, principal of Juneau-Douglas High School, believed the banner would endorse adolescent marijuana use. *Id.* at 401.

43. *Id.* at 410-11 (Thomas, J., concurring) (“[T]he First Amendment . . . does not protect student speech in public schools.”); see also Stanley Fish, *Clarence Thomas Is Right*, N.Y. TIMES, July 8, 2007, available at <http://fish.blogs.nytimes.com/tag/student-rights/> (posting of Stanley Fish, professor of law at Florida International University, agreeing with Thomas that students do not have any First Amendment rights and suggesting students do not have any rights at all).

44. *Tinker*, 393 U.S. at 513.

45. *Fraser*, 478 U.S. at 683.

portrayed as the school's own speech;⁴⁶ or (4) might reasonably be regarded as promoting illegal drug use at a school-related function.⁴⁷ However, the Supreme Court has not ruled on the scope of a school's authority to regulate a student's expression that does not occur on school grounds or at a school-sponsored event—let alone a student's speech that was created over the Internet.⁴⁸

Not having the comfort of being able to select what cases they will hear, lower courts have been forced to confront the issue of whether public schools possess the constitutional authority to regulate a student's online speech. Some existing case law suggests schools have absolutely no authority to regulate a child's behavior beyond the schoolhouse gates.⁴⁹ But, fearful of classroom disruption, it appears these lower courts have retreated to the broad reach of *Tinker* to solve a complex issue for which its rationale was never intended.⁵⁰

46. *Kuhlmeier*, 484 U.S. at 271.

47. *Morse*, 551 U.S. at 409.

48. *Doninger*, 527 F.3d at 48; see also DAVID J. HUDSON JR., STUDENT ONLINE EXPRESSION: WHAT DO THE INTERNET AND MYSPACE MEAN FOR STUDENTS' FIRST AMENDMENT RIGHTS 26 (2006), <http://www.firstamendmentcenter.org/about.aspx?id=17913> (follow "Download report" hyperlink) (suggesting, in the author's conclusion of his report, the need for the United States Supreme Court to decide an online student expression case).

49. See *Thomas v. Bd. of Ed., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1051 (2d Cir. 1979) (holding school lacked constitutional authority to punish students for an offensive student publication that was created and distributed off-campus); *Klein v. Smith*, 635 F. Supp. 1440, 1441 (D. Me. 1986) (holding unconstitutional a school's punishment for a student that extended his middle finger towards a teacher while in a restaurant parking lot because any connection between the student's conduct and the school's proper function was "too attenuated"); see also Brenton, *supra* note 4, at 1223 (interpreting the *Tinker* majority's statement that a student's rights must be "applied in light of the special characteristics of the school environment," by negative inference, to mean that off of the school's property administrators have no authority to regulate student conduct whatsoever). But see *Schwartz v. Schuker*, 298 F. Supp. 238, 241 (E.D.N.Y. 1969) (finding it constitutionally permissible for school to punish student for bringing onto campus an inappropriate underground student publication criticizing school officials); *Sullivan v. Houston Indep. Sch. Dist.*, 475 F.2d 1071, 1076 (5th Cir. 1973) (upholding school punishment for student who brought offensive, critical publications onto school property). See generally BELKNAP, *supra* note 25, at 292 (discussing how Justice Black, who dissented from the majority in *Tinker*, had a grandson who was suspended from his high school in New Mexico for helping write and distribute an underground newspaper).

50. See *Killion v. Franklin Reg. Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (concluding an overwhelming amount of authority has applied the standard set forth by the Court in *Tinker* when facing a student expression issue, regardless of whether a student was on or off of the school's campus).

III. ANALYSIS

A. Analyze This

In order to grasp the potential magnitude of the Second Circuit's ruling, this analysis will compare and contrast *Doninger* with past cases that have similarly ruled on whether students may be punished by public schools for speech that was created online. By doing so, this analysis highlights the flaws of using the *Tinker* standard in such cases, as it has been employed by a majority of courts when dealing with the issue. Further, this analysis sheds light on what the *Doninger* ruling may mean for public school students in the future.

B. Has the Internet Created a 24/7 Student?

The nature of the Internet presents several inherent difficulties for courts in determining whether a public school may constitutionally punish a student for his or her online expression.⁵¹ But perhaps the greatest challenge is determining whether the Internet has at all times transformed children, who may be completely away from a school's campus, into "students" for First Amendment purposes.⁵² Unlike the public forum given to a student by a school-sponsored event or the school's own hallways, the Internet is a medium by which an individual's expression may ultimately reach a school's campus without it ever being his or her true intention.⁵³ For this very reason, at least one court was

51. See David R. Johnson & David Post, *Law and Borders – The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1367 (1996) (discussing the difficulty of applying laws that traditionally require territorial borders to online conduct); *J.S.*, 807 A.2d at 863 ("[T]he advent of the internet has complicated the analysis of restrictions on speech."); see also *Reno*, 521 U.S. at 850-53 (explaining the origin of the Internet and the inimitable characteristics that apply to its use). "The Internet is 'a unique and wholly new medium of worldwide human connection.'" *Id.* at 850.

52. See *Fraser*, 478 U.S. at 683 (explaining that students enjoy a limited amount of First Amendment rights).

53. See *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 166 (S.D.N.Y. 1997) ("Any Internet user anywhere in the world with the proper software can create a Web page, view Web pages posted by others, and then read text . . ."); KEVIN W. SAUNDERS, *SAVING OUR CHILDREN FROM THE FIRST AMENDMENT* 165 (New York University Press 2003) (discussing, in the context of adolescent exposure to sexual matter online, the need for a simple affirmative act by the user to access the content of any individual's website). See also *Beussink*, 30 F. Supp. 2d at 1177-78 (stating that because she was upset with Beussink and had previously viewed his website, witness had sought to retaliate against Beussink by showing the site to the school's computer teacher without Beussink's consent in order to get him in trouble). See generally Dahle, *supra* note 5 (mentioning the importance of where Doninger's speech in fact took place).

willing to reject the application of *Tinker*.⁵⁴

1. *An Exception to the Rule: Tinker Doesn't Fit*

Nick Emmett, much like Avery Doninger, created a website from his home without the aid of any school resources.⁵⁵ The then eighteen-year-old posted comments pertaining to faculty members, but he also drafted mock obituaries of his friends.⁵⁶ School administrators learned of the website through a local television news story and subsequently suspended Emmett from classes for five days.⁵⁷ Declining to apply the *Tinker* rationale, the United States District Court for the Western District of Washington held that the punishment violated Emmett's First Amendment rights because "the speech was entirely outside of the school's control."⁵⁸ *Emmett* certainly stands for the proposition that LMHS had absolutely no authority to regulate Doninger's off-campus online expression.

C. *Federal and State Courts Often Agree on the Student Requirement but Split on the Constitutionality of the Regulation*

It appears from a substantial majority of similar cases involving a child's off-campus online expression that *Emmett* is the exception and not the rule. Courts are often willing to treat children like Emmett and Doninger as students when their online speech simply pertains to the school environment, regardless of how and where it was created. Unfortunately, and not surprisingly, the language adolescent students are likely to use when expressing themselves online is going to be considered lewd or offensive by many adults.⁵⁹

54. *Emmett*, 92 F. Supp.2d at 1090; *Boroff v. Van Wert City Bd. Of Educ.*, 220 F.3d 465, 469 (6th Cir. 2000), *cert. denied*, 532 U.S. 920 (2001).

55. *Emmett*, 92 F. Supp. 2d at 1089.

56. *Id.* Emmett's website even allowed users that navigated to the page to vote on who would be the subject of the next mock obituary. *Id.* The obituaries were supposedly inspired by a project in Emmett's creative writing class at Kentlake High School that called for students to draft their own mock obituary. *Id.*

57. *Id.*

58. *Id.* at 1090. In granting Emmett's temporary restraining order prohibiting the school from enforcing its punishment, the district court discussed *Tinker*, *Fraser*, and *Kuhlmeier* but did not specifically apply any of the tests set forth by those decisions to the facts of his case. *Id.* See generally Student Press Law Center, *The First Amendment vs. School Safety*, http://www.splc.org/report_detail.asp?edition=6&id=574 (last visited Mar. 28, 2010) (explaining that prior to a preliminary injunction hearing the parties settled and within the agreement Kentlake High School stipulated to drop its punishment of Emmett).

59. See Mike Thelwall, *MySpace, Facebook, Bebo: Social Networking Students*, ASSOCIATION FOR LEARNING TECHNOLOGY, Jan. 25, 2008, http://newsletter.alt.ac.uk/e_article000993849.cfm (demonstrating the extent

Fraser clearly gives schools the authority to punish students' "plainly offensive speech" that takes place *on the school's campus*.⁶⁰ However, the issue often facing these courts is different. Courts are being forced to determine whether school authorities have the constitutional right to regulate a student's offensive speech that was created away from campus and on the Internet.⁶¹

1. Tinker May Provide Offensive Online Expression Some Form of Protection

Brandon Beussink created a website from his home computer that used crude and vulgar language to criticize his high school's teachers, principal, and even the school's own homepage.⁶² Upon learning of the online expression from another student that had accessed the site from school, Beussink's principal suspended him for ten days.⁶³ Unlike the Second Circuit in Doninger's scenario, the United States District Court for the Eastern District of Missouri struck down the punishment and found there was no potential for a purely offensive website to cause a substantial disruption to school functions.⁶⁴ The court went on to state that "disliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech under *Tinker*."⁶⁵ Similar results have been reached in cases subsequent to *Beussink* as well.⁶⁶

of swearing by adolescents using MySpace). The extent that one uses "swear words" to communicate appears to decline with one's age. *Id.* Thelwall's data also suggests male adolescent MySpace users post more "swear words" than female users of a similar age. *Id.*

60. *Fraser*, 478 U.S. at 683.

61. See *Kuhlmeier*, 484 U.S. at 272 (distinguishing the difference between the First Amendment analysis applied in *Tinker* and that applied in *Fraser*). "The decision in *Fraser* rested on the 'vulgar,' 'lewd,' and 'plainly offensive' character of a speech . . . rather than any propensity of the speech to 'materially disrupt classwork . . .'" *Id.*

62. *Beussink*, 30 F. Supp. 2d at 1177.

63. *Id.* at 1179-80.

64. *Id.* at 1180.

65. *Id.* A key factor in this determination by the court was the principal's own testimony in which he had disciplined Beussink because he did not agree with the content of the website. *Id.*

66. See *Killion*, 136 F. Supp. 2d at 455 (holding a student's suspension for emailing to other students a "Top Ten" list criticizing faculty failed to satisfy *Tinker* because of a lack of substantial disruption); *Layshock*, 496 F. Supp. 2d at 600 (concluding a school district had failed to demonstrate a sufficient nexus between a student's online expression and a substantial disruption of the school environment); *Mahaffey*, 236 F. Supp. 2d at 784 (holding a nonsensical website entitled "Satan's web page," that included a list of people the student had wished would die, did not interfere with the work of the school).

The district court in *Mahaffey* even provided an excerpt of the website

2. Applied Right, Tinker Just Might Work

The *Tinker* rationale can certainly produce a just result in *certain* off-campus online expression cases. For instance, take the facts involved in the case of Justin Swindler. Similar to Doninger, Emmett, and Beussink, Swindler created a website on his home computer without the use of any school time or resources.⁶⁷

The website contained derogatory depictions of Swindler's principal and algebra teacher.⁶⁸ Clearly, the most distasteful portion of the site pertained to Swindler's desire to murder his algebra teacher.⁶⁹ Upon hearing of the website from the school's principal, Swindler's algebra teacher did not complete the school year and took a medical leave of absence for the following year as well.⁷⁰ The Supreme Court of Pennsylvania upheld the middle school student's expulsion in large part because of the disruption caused by the teacher's absence from the educational environment.⁷¹

The mere online expression of violence does not always produce a just result under *Tinker*. Aaron Wisniewski was

that failed to justify the school's suspension under *Tinker*. Mahaffey's website stated:

This site has no purpose. It is here to say what is cool, and what sucks. For example, Music is cool. School sucks. If you are reading this you probably know me and Think Im evil, sick and twisted. Well, Some might call it evil. I like to call it__ well evil I guess. so what? If you don't know me you will see. I hope you enjoy the page.

After listing various interests, Mahaffey continued:

SATAN'S MISSION FOR YOU THIS WEEK: Stab someone for no reason then set them on fire throw them off of a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face. Killing people is wrong don't do It. unless Im there to watch. __ Or just go to Detroit. Hell is right in the middle. Drop by and say hi.

PS: NOW THAT YOU'VE READ MY WEB PAGE PLEASE DON'T GO KILLING PEOPLE AND STUFF THEN BLAMING IT ON ME. OK?

Id. at 781-82. See generally Student Press Law Center, Schools Watch Web Expression, http://www.splc.org/report_detail.asp?id=934&edition=23 (last visited Mar. 28, 2010) (providing supplemental information pertaining to Mahaffey's suspension).

67. *J.S.*, 807 A.2d at 850. See generally HUDSON, *supra* note 48, at 17-19 (providing further analysis of the court's ruling in *J.S.*).

68. *J.S.*, 807 A.2d at 850. "The site was entitled 'Teacher Sux.' It consisted of a number of web pages that made derogatory, profane, offensive and threatening comments . . ." *Id.*

69. *Id.* at 851. Below Swindler's caption of "Why Should She [the algebra teacher] Die?" the page requested the user to "[t]ake a look at the diagram and the reasons I gave, then give me \$20 to help pay for the hitman [sic]." *Id.*

70. *Id.* at 852.

71. *Id.* at 869 ("J.S.'s website created an actual and substantial interference with the work of the school to a magnitude that satisfies the requirements of *Tinker*."). See also Brenton, *supra* note 4, at 1219-20 (discussing *J.S.* and *Layshock* and noting that although similar facts existed between the cases, different results were subsequently reached by reviewing courts).

suspended for creating an America Online Instant Messenger icon that depicted the killing of his middle school's principal.⁷² Despite police concluding the icon was meant as a joke,⁷³ the Second Circuit upheld the student's suspension because the drawing could create a reasonably foreseeable risk of material and substantial disruption to the work and discipline of the school.⁷⁴

D. Doninger's Differences

Despite these conflicting results, Avery Doninger's scenario brings the flaws of applying *Tinker's* standard to off-campus online expression issues into an even brighter light. Unlike past cases in which *Tinker* has been applied to uphold a student's punishment, Doninger's online expression did not present what could be perceived as a threat of violence to anyone related to her school.⁷⁵

Rather, the Second Circuit Court of Appeals essentially concluded that offensive online expression, in and of itself, could constitute a substantial disruption to the school environment. The court rested its reasoning that Doninger's punishment was constitutionally permissible on three different grounds: (1) the language used by Doninger was offensive;⁷⁶ (2) the post was

72. *Wisniewski*, 494 F.3d at 36. The Instant Messenger icon was displayed and sent to roughly fifteen members of Wisniewski's "buddy list" and only reached school administrators by way of a fellow classmate, who happened to be an unintended recipient. *Id.*; see Kevin Fayle, *Student's Suspension for IM Buddy Icon Upheld by U.S. Court*, THE REGISTER, July 12, 2007, http://www.theregister.co.uk/2007/07/12/im_aim_icon_suspension/ (discussing *Wisniewski* and what the holding means for American students through the lens of a European online publication). See generally PHILIPPA STRUM, *WHEN THE NAZIS CAME TO SKOKIE 123* (University Press of Kansas 1999) (discussing the differences between freedom of speech disputes in the United States and other nations). In America, a great emphasis is placed on individual rights and responsibilities, as opposed to how "most other nations emphasize rights as being exercised within the context of obligation to the community." *Id.*

73. *Wisniewski*, 494 F.3d at 38. The police officer that was informed of the icon by local school officials interviewed Wisniewski and concluded the student understood what he had done, but "posed no real threat." *Id.*

74. *Id.* at 40.

75. See *J.S.*, 807 A.2d at 850-51 (demonstrating the suggestion of killing his algebra teacher was pertinent to the court's decision to uphold Swindler's punishment); *Wisniewski*, 494 F.3d at 36 (discussing in detail Wisniewski's graphic depiction of harming his school's principal); see also *Emmett*, 92 F. Supp. 2d at 1090 (noting the difficult position school administrators find themselves in as they attempt to balance the First Amendment rights of students against protecting those same students from harm in the wake of school shootings throughout the country); Brenton, *supra* note 4, at 1206 (mentioning "Columbine" as an example of what form of disruption school administrators are seeking to prevent by censoring students' online expression).

76. *Doninger*, 527 F.3d at 50-51.

misleading;⁷⁷ and (3) the discipline related to an extracurricular role at LMHS.⁷⁸

The first justification the Second Circuit used in its supposed *Tinker* analysis undoubtedly likened Doninger's online expression to that which was constitutionally punishable in *Fraser*.⁷⁹ But Justice William Brennan⁸⁰ made clear in his concurring opinion in *Fraser* that if a student had given a similar offensive speech "outside of the school environment he could not have been penalized simply because government officials considered his language to be inappropriate."⁸¹ The Second Circuit completely disregarded Brennan's direction in its analysis. As its only basis for the assertion that Doninger's offensive speech could somehow cause a substantial disruption, the court merely pointed out that another student had responded to Doninger's blog post with a vulgar comment of his or her own.⁸²

The Second Circuit next pointed out in its analysis that Doninger's blog post had contained misleading information, that Jamfest may have been cancelled, in her attempt to encourage others to contact school authorities.⁸³ The First Amendment has never required individuals to speak the absolute truth.⁸⁴ As Justice Sandra Day O'Connor succinctly pointed out in *Virginia v.*

77. *Id.* at 51.

78. *Id.* at 52.

79. *See Fraser*, 478 U.S. at 683 (discussing that it is an appropriate function of administrators to prohibit vulgar and offensive language in the school environment). Principal Niehoff had sought for the Second Circuit to interpret its holding in *Wisniewski* to implicitly mean schools are able to regulate off-campus offensive speech that does not cause a material or substantial disruption to school activities. *Doninger*, 527 F.3d at 50.

80. *See* BOB WOODWARD AND SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 443-44 (Simon and Schuster 1979) (discussing, during the end of the 1975 term, the mood and role of Brennan as one of the few remaining liberal holdovers from the Warren Court as the Supreme Court began to move towards a far more conservative ideology).

81. *Fraser*, 478 U.S. at 688 (Brennan, J., concurring). Brennan's entire concurrence focused on the narrow circumstances in which the Court's ruling in *Fraser* ought to apply in the future. *Id.* at 688-90; *see also* SAUNDERS, *supra* note 53, at 190 ("Schools have latitude to prevent disruption caused by speech that must be tolerated outside the schools.").

82. *Doninger*, 527 F.3d at 51. The Second Circuit Court of Appeals suggested that since a fellow student followed up Doninger's blog post with another vulgar comment, Doninger's ability to "recruit could create a risk of disruption." *Id.*

83. *Id.*

84. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). *See also* NAT HENTOFF, *FREE SPEECH FOR ME – BUT NOT FOR THEE* 306 (HarperCollins Publishers 1992) (discussing the proper punishment for false speech is true speech that exposes the "the lies and distortions and sheer meanness of the awful speech in question").

Black,⁸⁵ “the hallmark of the protection of free speech is to allow ‘free trade in ideas’—even ideas that the overwhelming majority of people might find distasteful or discomforting.”⁸⁶

Finally, the Second Circuit sought to justify its decision that Doninger’s blog post constituted a substantial disruption to school functions based upon the punishment she ultimately received. Unlike past cases that involved students being suspended from attending classes, Doninger suffered no adverse effects to her grades because of her punishment. She was simply disqualified from running for Senior Class Secretary, an extracurricular activity in which she was never entitled to participate.⁸⁷

Perhaps, the form of punishment Doninger received is ultimately why her argument failed in the eyes of the Second Circuit. Similar to an athlete disobeying his or her coach,⁸⁸ administrators determined Doninger’s behavior was not “consistent with her desired role as a class leader.”⁸⁹ However, her behavior immediately following the posting of the offensive comments to her blog caused no substantial disruption to the Student Council of LMHS as evidenced by the fact she was able to continue as Junior Class Secretary.⁹⁰

Regardless of whether LMHS struck the proper balance between Doninger’s punishment⁹¹ and her First Amendment rights, the Second Circuit analyzed what certainly appeared to be a *Fraser* issue under *Tinker*’s framework. Although *Tinker* requires a student’s conduct to at least create a foreseeable risk of *material and substantial disruption* to the work and discipline of a

85. 538 U.S. 343 (2003).

86. *Id.* at 358.

87. *Doninger*, 527 F.3d at 52.

88. *See* *Lowery v. Euverard*, 497 F.3d 584, 593 (6th Cir. 2007) (holding the dismissal of students from a high school football team constitutionally permissible because they had distributed amongst other team members a petition that constituted a disruption to the extracurricular activity). *See also* *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995) (holding student athletes are subject to more restrictions on individual liberties than the student body at large).

89. *Doninger*, 527 F.3d at 52.

90. *See Doninger*, 514 F. Supp. 2d at 203 (explaining that the federal district court had found Doninger was regarded as a “good student” and “citizen” at her high school). Niehoff also testified that it was not her intention to remove Doninger from office, but simply to bar her from running for reelection and speaking at graduation ceremonies. *Id.* at 208.

91. *See generally* Ken Krayske, *Doninger Graduates, Escapes a School Emboldened to Punish Students For Online Activity*, THE 40-YEAR PLAN, June 21, 2008, http://www.the40yearplan.com/article_062108_Doninger_Graduates.php (noting, in an ironic twist of fate, shortly after the school’s victory over Doninger, Niehoff was suspended from her duties as principal of LMHS for writing emails that included “unsubstantiated allegations” about Doninger in violation of federal privacy laws).

school,⁹² the Second Circuit's reasoning that Doninger's off-campus online expression did so is suspect at best. For this reason, Doninger's case may be seen as a conduit for courts in the future to simply disregard years of precedent⁹³ and Justice Brennan's clear mandate,⁹⁴ while simply applying *Fraser's* analysis to uphold a student's punishment for non-disruptive, yet purely offensive off-campus online expression.

Indeed, the United States District Court for the Middle District of Pennsylvania did just that on September 11, 2008, in *J.S. v. Blue Mountain School District*.⁹⁵ The court completely scrapped the notion *Tinker* was to apply to a student's off-campus online expression.⁹⁶ Instead, a student's suspension for creating a MySpace page away from campus that caused no disruption, but vulgarly lampooned her middle school's principal, was upheld under *Fraser*.⁹⁷

IV. PROPOSAL

The United States Supreme Court should grant a writ of certiorari to decide a student's First Amendment claim against his or her public school pertaining to punishment received for off-campus online expression. In ruling on the case, the Court should set forth a clear standard that gives adequate notice to adolescent students of the forms of online speech that are subject to punishment by school authorities. The standard suggested by this

92. *Tinker*, 393 U.S. at 511.

93. See *Killion*, 136 F. Supp. 2d at 455 (suggesting, whether on or off of campus, a majority of student speech issues have been analyzed in accordance with *Tinker*); *J.S.*, 807 A.2d at 866 ("The few courts that have considered Internet communication [in the context of a student's online expression] have focused upon *Tinker* in their analysis."). See also cases cited *supra* note 16 (identifying several cases that have applied the *Tinker* standard to student online expression issues).

94. See *supra* note 81 and accompanying text (setting forth Brennan's attempt to clarify *Fraser's* holding in his concurrence).

95. No. 3:07-cv-585, 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008).

96. *Id.* at *7. The middle school student's suspension was upheld by the court despite the fact that "a substantial disruption so as to fall under *Tinker* did not occur." *Id.*

97. *Id.* at *8. The court in *Blue Mountain* attempted to distinguish its holding from courts' decisions in past cases, particularly *Killion* and *Layshock*, in which a school was found to have violated a student's First Amendment rights based upon: (1) the level of vulgarity used in J.S.'s online expression; (2) certain effects it had on school functions; and (3) the fact the speech could have supported criminal charges against the student. *Id.*

The court in *Layshock* determined it was a "close call" in declining to uphold a student's suspension for offensive online expression under *Tinker*. *Layshock*, 496 F. Supp. 2d at 601. However, the court in *Blue Mountain* decided that since language used in its case was "much more vulgar and offensive," it was justified in coming "out on the other side of . . . a 'close call.'" *Blue Mountain*, 2008 WL 4279517, at *8.

Comment is based on a modified 'true threat' form of First Amendment analysis.

A. Now Is the Time for the Supreme Court to Get Involved

Public schools today no doubt serve the same essential government interest as in years past: preparing the country's youth to succeed in life beyond the schoolhouse gates.⁹⁸ In carrying out this awesome responsibility, educators are at times forced to strike a balance between protecting the constitutional freedoms of their students⁹⁹ and protecting the normal functions of the school itself.¹⁰⁰ In so doing, school authorities certainly should be allowed to regulate student expression that takes place within the school environment. The rulings by the Supreme Court in *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse* certainly articulate why this widely accepted principle stands on solid First Amendment grounds. But the constitutional right to regulate student expression that takes place online, completely away from a school's campus, does not boast such clear boundaries.¹⁰¹

The United States Supreme Court should speak on the issue now, a time when adolescent students are using the Internet to communicate with peers and discuss educational topics more than ever.¹⁰² The present landscape, as set forth by lower federal and state courts, shows that a student's punishment for offensive online expression under *Tinker* depends almost entirely on the level of tolerance of presiding judges and justices for the language being used.¹⁰³ In Avery Doninger's case, it appears the district

98. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (explaining the important role public education serves in our nation's society). "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Id.*

99. See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (setting forth the importance of protecting the First Amendment rights of school children guaranteed by the Constitution).

100. *Tinker*, 393 U.S. at 513.

101. See *Doninger*, 527 F.3d at 48 (noting the Supreme Court has yet to rule on a student's First Amendment claim pertaining to punishment for his or her online expression); HUDSON, *supra* note 48, at 26 (suggesting the need for the Court to rule on an online student expression issue).

102. SCHOOL BOARDS, *supra* note 1, at 1-2 (demonstrating how often today's adolescent students are using the Internet, and in particular social networking websites, to connect with fellow students outside of the school environment).

103. Compare *Beussink*, 30 F. Supp. 2d at 1180 (holding that a web page using offensive language that was critical of school functions and was created from the confines of a student's home did not satisfy *Tinker's* First Amendment analysis), and *Mahaffey*, 236 F. Supp. 2d at 784 (finding no evidence of a student's offensive web page interfering with school functions), with *J.S.*, 807 A.2d at 869 (concluding a student's punishment for the creation of a derogatory web page away from school could be justified under *Tinker*), and *Wisniewski*, 494 F.3d at 40 (upholding student's punishment for online

court was willing to justify *Tinker's* application without any indication that a material and substantial disruption was likely to occur.¹⁰⁴ Moreover, the court in *J.S. v. Blue Mountain School District* was willing to scrap *Tinker's* application altogether.¹⁰⁵ Students and educators deserve to know when and what form of online expression is subject to punishment without running afoul of students' First Amendment rights.

The need for a clear standard to prevent disruption from occurring in schools may never be more appropriate. In light of the horrific school shootings that occurred at Columbine High School¹⁰⁶ and Virginia Tech University,¹⁰⁷ school authorities should be able to preemptively protect students and teachers from harm before it occurs. This proposal suggests nothing to the contrary.

B. 'True Threat' Truly Protects Both Students and Schools

As students begin to express themselves online more often, the Internet is certainly an area where violent tendencies may come to light.¹⁰⁸ Nevertheless, *Tinker's* "material and substantial disruption" analysis has begun to subject a student to government regulation for expression created away from school that merely offends, rather than potentially harms. If the online expression was subject to punishment only when it constituted a 'true threat' of violence to members of a school's community, students like Avery Doninger would not have to fear using lewd or offensive language in online communications that take place away from a school's campus.

off-campus expression under *Tinker*).

104. *Doninger*, 527 F.3d at 51-52.

105. *J.S.*, 2008 WL 4279517, at *7.

106. See Dave Cullen, *The Depressive and the Psychopath*, SLATE, Apr. 20, 2004, <http://www.slate.com/id/2099203/#sb2099208> (examining the Columbine High School shootings that took place on April 20, 1999, and the motivation of the two students behind the killings of twelve of their fellow students and one teacher).

107. See Christine Hauser & Anahad O'Connor, *Virginia Tech Shooting Leaves 33 Dead*, N.Y. TIMES, Apr. 16, 2007, available at <http://www.nytimes.com/2007/04/16/us/16cnd-shooting.html> (reporting of the school shooting at Virginia Tech University that claimed the lives of thirty-three people).

108. See Cullen, *supra* note 106 (illustrating why the comments made on the website of one of the Columbine High School killers, Eric Harris, may point to him having been a psychopath bent on using violence to demonstrate his contempt for what he perceived to be others' mental inferiority). See also Kathryn Westcott, *Cho Fits Pattern of Campus Killers*, BBC NEWS, Apr. 19, 2007, <http://news.bbc.co.uk/2/hi/americas/6567143.stm> (noting that similar to other individuals involved in school shooting who had "left behind rage-filled testaments . . . via the internet," Cho Seung-Hui (Virginia Tech University shooter) had left behind a video indicating his future intention to commit violent acts towards others).

Therefore, the Supreme Court's analysis should rest on whether a reasonable person in the student's position would foresee that *any user* who navigated to the student's online speech would reasonably interpret the speech as a serious expression of intent to cause bodily harm.¹⁰⁹ The student's online expression should be considered in light of the entire factual context in which the statements were made, including the reaction of the user.¹¹⁰ This standard would only be applied in cases involving students like Doninger whose expression was created entirely away from a school's campus, without school resources, and not intentionally brought onto campus by the creator. Additionally, the "any user" modification of this objective standard attempts to take into account the unique nature of the Internet.¹¹¹ By holding students accountable for *any* unintended viewer's reasonable perception of a threat, the standard would not completely disregard *Tinker's* broad ability to preemptively regulate potential school disruption.

Further, if a 'true threat' form of First Amendment analysis were to be applied only to a student's off-campus online

109. The United States Supreme Court in *Watts v. United States* did little to specifically define what constitutes a 'true threat.' See *Watts*, 394 U.S. at 708 (declining to uphold Watts' punishment, the Court was able to conclude his statement did not rise to the level of a 'true threat' because "[t]aken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise").

Unfortunately, the Supreme Court has not provided much guidance on the issue since *Watts*. *J.S.*, 807 A.2d at 857. However, lower federal and state courts have attempted to define what constitutes a 'true threat' by using an objective standard. See *U.S. v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990) ("Whether a particular statement may properly be considered to be a threat is governed by an objective standard.").

In the past, few courts have used a 'true threat' form of analysis in determining whether certain *on-campus* student expression was entitled to First Amendment protection. See *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 373 (9th Cir. 1996) (holding a student's comment to a school guidance counselor that "[i]f you don't give me this schedule change, I'm going to shoot you," constituted a 'true threat' and was entitled to no First Amendment protection); *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 621-27 (8th Cir. 2002) (using 'true threat' analysis in determining the constitutionality of a student's punishment for writing a letter in which the student communicated a desire to rape and murder a fellow classmate); cf. *Killion*, 136 F. Supp. 2d at 455 (stating that *Tinker* has been the predominant test applied by courts when faced with a student expression issue, regardless of whether the speech at issue occurred on or off campus).

110. See *Orozco-Santillan*, 903 F.2d at 1265 (stating that alleged verbal threats are to be considered in light of the entire factual context, including surrounding events and the effect on the listeners).

111. See *Johnson & Post*, *supra* note 51, at 1367 (mentioning the difficulties of applying laws based on geographic boundaries to online methods of communication that have no such boundaries); *Brenton*, *supra* note 4, at 1216 ("Web content created in one location can be instantaneously accessed anywhere in the world, thus undermining the spatial link between a student's expression and its reception.").

expression, educators would still maintain the authority to regulate offensive online speech that was created in the classroom, brought onto campus by the student, or created with school resources through the standards enunciated in *Fraser* and *Kuhlmeier*. In granting students the right to create online speech away from school that simply offends, rather than harms, the proposed standard would also remain true to *Tinker*. The majority in *Tinker* made clear that a school's prohibition of a particular opinion must be "caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."¹¹² Moreover, should a school district choose to punish a student only when a 'true threat' is made online, courts would likely not disturb the form of punishment imposed.¹¹³

C. Alternative Means of Punishment and Regulation

If the language used by the student rose to a defamatory level, the proposed standard would not prevent the target of the online expression from bringing a private cause of action against the student.¹¹⁴ A libel or defamation suit brought against a student would provide an adequate remedy to a truly injured party, demonstrate to students the 'real world' consequences of creating grossly offensive online expression, and offer parents or guardians an incentive to adequately monitor their adolescent student's Internet activities. A private cause of action would provide the ancillary benefit of allowing a student to miss time away from classes, which has often been the preferred choice of punishment for most schools.¹¹⁵

112. *Tinker*, 393 U.S. at 509.

113. See *Wood v. Strickland*, 420 U.S. 308, 326 (1975) ("It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion.").

114. KATHLEEN CONN, *THE INTERNET AND THE LAW: WHAT EDUCATORS NEED TO KNOW* 35-36 (Association for Supervision and Curriculum Development 2002) (discussing the ability of school district employees to bring private causes of action against students for defamatory statements made online); see also Anne Broache, *Principal Sues Ex-Students Over MySpace Profile*, CNET NEWS, Apr. 9, 2007, http://news.cnet.com/2100-1030_3-6174506.html (highlighting the decision of the principal from the *Layshock* case to bring a lawsuit against a number of his former students).

115. See TABY ALI & ALEXANDRA DUFRESNE, MISSING OUT: SUSPENDING STUDENTS FROM CONNECTICUT SCHOOLS 21 (Aug. 2008), http://www.ctkidslink.org/pub_detail_423.html (follow "Full Report" hyperlink) (providing a comprehensive study of suspensions given to students by Connecticut schools and concluding the "students at greatest risk of being excluded from school are those who need educational opportunity the most").

V. CONCLUSION

When an adolescent student's offensive online expression is created entirely away from a public school's campus, courts should be willing to subject whatever punishment the child receives as a result of that expression to a different constitutional standard than ordinary speech made in a school's hallways. As Avery Doninger's case exemplifies, *Tinker's* "material and substantial interference"¹¹⁶ standard subjects purely offensive online speech to an overbroad rationale attempting to do a job for which it is ill prepared. Now is clearly the time for the Supreme Court to address this issue and provide to lower courts an adequate standard by which students' online expression can properly be regulated. The proposed 'true threat' form of analysis would do just that.

116. *Tinker*, 393 U.S. at 511.

